NO. 96-1655

Supreme Court, U.S.
FILED
MAY 22 1997
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1996

DAVID L. SMITH, as assignee of the interest of original Plaintiff, C. H. FAULKENBERRY, JR.,
Petitioners,

vs.

JOHN ELKINS, BENEFITS SYSTEMS, INC., MICROBE MASTERS, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION TO SUGGEST MOOTNESS

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20 pp

MOTION TO SUGGEST MOOTNESS

I. Introduction

International Biochemicals Group, Inc., ("IBG"), *amicus curiae,* [1] pursuant to United States Supreme Court Rule 21.2(b), suggests to the Court that the petition for writ of certiorari filed by David L. Smith ("Smith") is moot.

Smith attempted to revive by motion a federal consent judgment that was assigned to him by the wife of the deceased plaintiff in the original matter of *C. H. Faulkenberry, Jr. v. John Elkins, Benefits Systems, Inc. and Microbe Masters, Inc.*, Civil Action No. 85-146-B-1, United States District Court of the Middle District of Louisiana ("Original Action"). The District Court denied Smith's motion to revive the judgment. The United States Fifth Circuit Court of Appeals affirmed holding that Smith's motion to revive a federal judgment could not be maintained, because revival of federal judgments in district courts in Louisiana can only be instituted by an ordinary proceeding as required by Louisiana law. (Smith Petition for Writ of Certiorari, Appendix 1a).

II. Facts that Suggest Mootness

While his appeal to the Fifth Circuit was pending Smith filed a complaint to revive the federal judgment in an ordinary proceeding in the matter of *David L. Smith v. International Biochemicals Group, Inc.,* Civil Action No. 95-2041-A-1, United States Court of the Middle District

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[1] IBG filed this motion at the same time as its motion for leave to file brief of amicus curiae in opposition to the petition for writ of certiorari and in support of respondent, Microbe Masters, Inc.

of Louisiana ("Revival Action"). (Appendix A and B, p. A-3 and A-5, respectfully). The complaint was filed within the prescriptive period applicable for judgments under Louisiana law and in effect cured Smith's procedural deficiency. The district court then consolidated the Original Action and Smith's Revival Action. (Appendix A, p. A-3).

The consolidated action is now pending before the district court. IBG is a named defendant in the complaint, because it is alleged that IBG is the corporate successor to Microbe Masters, Inc. ("MMI"), one of the named defendants in the Original Action. (Appendix B, p. A-5-A-7). IBG has answered Smith's complaint, specifically asserting that the consent judgment is not enforceable against IBG, because MMI was never served with the original complaint making the judgment a nullity as to MMI and, alternatively, the original consent judgment was satisfied as to MMI by a partial cancellation in favor of MMI (Appendix C, p. A-12-A-13). Thus, the merits of Smith's claims for revival of the judgment assigned to him is presently being litigated in the district court.

II. Argument and Law

Both counsel for IBG and Smith have a continuing duty to bring to this Court's attention facts that raise questions of mootness, which may, in turn, affect the jurisdiction of this Court to even hear the appeal. See, *Arizonia for Official English v. Arizonia,* ____U.S.____, 117 S.Ct. 1055, at 1069, n. 23, 137 L.Ed.2d 170, at 194, n. 23 (1997). This duty is continuing and requires that counsel inform the Court of questions of mootness at any stage in the proceedings. *Id.* Facts that suggest mootness cannot be withheld from the Court and must be disclosed. *Id.*

Smith's petition for writ of certiorari seeks review of the Fifth Circuit's ruling that Smith cannot revive a federal judgment in federal district court in Louisiana by motion, because state law requires that revival be instituted by an "ordinary proceeding." Smith's petition fails to even mention the fact that he cured the procedural deficiency by filing an ordinary action in the district court.

Smith's filing of the "ordinary proceeding" cures the procedural deficiency and allows Smith to attempt to revive the federal judgment. In *Deacons v. Monoghan,* 484 U.S. 193, at 199-200, 108 S.Ct. 523, at 528, 98 L.Ed.2d 529, at 538 (1988), the Court dismissed an appeal after the plaintiffs, respondents, voluntarily asserted that they would no longer pursue their claim for equitable relief in federal court and would only seek relief in state court. Because Smith has voluntarily removed the procedural deficiency that prevented his attempt to revive the judgment, there is no longer a controversy and his petition should be denied because the question is now moot.

Respectfully submitted,

J. RODNEY RYAN, JR.
Counsel of Record
JONES, WALKER, WAECHTER,
POITEVENT, CARRÉRE & DENÉGRE,
L.L.P.
Attorneys for International Biochemicals Group, Inc., Amicus Curiae

APPENDIX A

APPEAL CLOSED
LEAD

U. S. District Court
Middle District of Louisiana (Baton Rouge)
CIVIL DOCKET FOR CASE#: 85-CV-146

Faulkenberry v. Elkins, et al — Filed: 2/19/85
Assigned to: Judge Frank J. Polozola
Demand: $0,000 — Nature of Suit: 890
Lead Docket: None — Jurisdiction: Federal Question
Dkt# in other court: None

Cause: 15:77 Securities Fraud

C H FAULKENBERRY, JR plaintiff	William P. Brumfield [COR LD NTC] Brumfield & Brumfield P. O. Box 91200 Baton Rouge, LA 70821 22033 504-343-0618
v.	
JOHN ELKINS defendant	Charles K. Watts [COR LD NTC] Seale, Smith, Zuber & Barnette 8550 United Plaza Bldg. Suite 200 Baton Rouge, LA 70809 22033 504-924-1600

Docket as of April 5, 1996 9:23 am

BENEFITS SYSTEMS INC defendant	Charles K. Watts (See above) [COR ld BTC]
MICROBE MASTER INC defendant	Charles K. Watts (See above) [COR LD NTC]
INTERNATIONAL BIOCHEMICAL GROUP consolidated defendant	Alton E. Bayard, III [COR LD NTC] Jones, Walker, Waechter, Poitevent, Carrere & Denegre Place St. Charles 201 St. Charles Avenue 50th Floor New Orleans, LA 70170 22071 504-582-8272 Michele Whitesell Crosby 504-231-2092 [COR] Jones, Walker, Waechter, Poitevent, Carrere & Denegre Four United Plaza 8555 United Plaza Blvd. 5th Floor Baton Rouge, LA 70809-7000 22033 504-231-2000 FTS 231-2010

Proceedings include all events APPEAL
3:85CV146 Faulkenberry v. Elkins, et al Closed Lead

__/19/85 - This is a skelton docket sheet consisting only of pleadings that were filed after the case closed. (hj) [Entry date 12/14/95]

1/2/86 - Case closed (hj) [Entry date 12/14/95]

11/21/95 10 MOTION by CH Faulkenberry Jr for substitution of party plaintiff by the purpose of a motion to receive the judgment. (hj) [Entry date 12/14/95]

11/21/95 11 MOTION by CH Faulkenberry Jr to revive judgment (hj) [Entry date 12/14/95]

11/27/95 12 ORDER denying [10-1] motion for substitution of party plaintiff...(signed by Judge Frank J. Polozola), issued notices. (hj) [Entry date 12/14/95] [Entry date 12/15/95]

11/27/95 13 ORDER denying [11-1] motion to revive judgment... (signed by Judge Frank J. Polozola), issued notices. (hj) [Entry date 12/14/95] [12/15/95]

12/14/95 14 MOTION to substitute David L. Smith as party and for Microbe Master, Inc. and International Biochemicals Group to Show Cause why a Writ of Execution/Fieri Facias should not issue (hj) [Entry date 12/15/95]

12/19/95 15 ORDER denying [14-1] motion to substitute David L. Smith as party plaintiff and show cause (signed by Judge Frank J. Polozola), issued notices (hj)

12/27/95 16 NOTICE OF APPEAL by David L. Smith...on order denying Motion to substitute plaintiff. Appeal record due on 1/26/96 (hj) [Entry date 01/03/96]

Proceedings include all events APPEAL
3:85CV146 Faulkenberry v. Elkins, et al Closed Lead

1/11/96	17	LETTER to Mr. David L. Smith from Richard T. Martin, Clerk RE: Writ of execution (hj) [Entry date 01/12/96]
1/18/96	-	Notice of Appeal and certified copy of docket to USCA: [16-1] appeal by David L. Smith (hj)
1/22/96	18	ORDER...CA 95-2041 is hereby consolidated with CA 85-146 and CA 95-2041 is transferred from Section A to Section B (signed by Judge Frank J. Polozola), issued notices. (hj)
1/22/96	-	Consolidated Lead Case (hj) [Entry date 02/06/96]
1/31/96	-	Notice of Appeal and certified copy of docket to USCA: [16-1] appeal by David L. Smith (hj)
2/5/96	-	SUMMONS(ES) issued for international Group. Service deadline set for 2/19/96. Consent Notices Mailed. (hj) [Entry date 02/06/96]
2/6/96	19	LETTER to Clerk from David Smith RE: Change of Address. (hj) [Entry date 02/07/96)
2/8/96	20	LETTER to Clerk from Charles Watts RE: A partial cancellation of judgment and judicial mortgage (copies attached) (hj) [Entry date 02/09/96]
2/8/96	-	USCA Case Number Re: [16-1] appeal by David L. Smith USCA NUMBER: 96-30089 (hj) [Entry date 02/09/96]
2/13/96	21	MOTION by David L. Smith to appeal order rendered 12/13/95 denying motion to substitute and rule to show cause (hj)
2/22/96	-	USCA appeal fees received FILING FEE $ 105.00 RECEIPT # 58532 (hj) [Entry date 02/23/96]

Proceedings include all events APPEAL
3:85CV146 Faulkenberry v. Elkins, et al Closed Lead

3/22/96	22	ANSWER to Complaint by International Croup (Attorney Alton E. Bayard III, Michele Whitesell Crosby), (sh)
3/28/96	-	Certified and transmitted Record on Appeal to U.S. Court of Appeals: [16-1] appeal by David L. Smith (hj)
4/1/96	23	STATUS REPORT by David L. Smith (hj) [Entry date 04/02/96]
4/3/96	-	USCA Case Number Re: [16-1] appeal by David L. Smith USCA NUMBER: 96-30089 (hj) [Entry date 04/04/96]

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

DAVID L. SMITH	CIVIL ACTION
VERSUS	NO. 95-2041
INTERNATIONAL BIOCHEMICALS GROUP, INC.	SECTION A-1

PETITION TO REVIVE JUDGMENT

The petition of David L. Smith, a resident of East Baton Rouge Parish, Louisiana respectfully represents:

I.

This is a petition for revival against the successor corporation to the original judgment debtor corporation **Microbe Masters, Inc.** of a judgment granted by this court January 3, 1986 in Civil Action 85-146 "C. H. Faulkenberry, Jr. versus Elkins, Benefits Systems, Inc., Microbe Masters, Inc." and is a matter ancillary to the original action and independent grounds of jurisdiction are not required.

II.

Defendant **International Biochemicals Group, Inc.** is a for profit corporation organized under the laws of the State of Deleware but is authorized to transact business in Louisiana and maintains corporate offices at 10201 Mayfair Drive, Baton Rouge, Louisiana 70809 and has appointed

Gary Legendre at 10201 Mayfair Drive, Baton Rouge, Louisiana 70809 as its registered agent in Louisiana.

III.

Defendant **International Biochemicals Group, Inc.** was formerly known as **Environmental Remediation, Inc.** having amended its Articles of Incorporation on June 23, 1994. **Environmental Remediation, Inc.** was formerly known as **Innovative Ventures Group, Inc.** was incorporated in accordance with the laws of the State of Deleware on December 3, 1991.

IV.

At 11:59 P.M. on June 30, 1992, defendant **International Biochemicals Group, Inc.,** f/k/a **Environmental Remediation, Inc.** f/k/a **Innovative Ventures Group, Inc.,** pursuant to terms of merger contained in a **CERTIFICATE OF OWNERSHIP AND MERGER** between and among Environmental Solutions, Inc., Environmental Solutions Industries, Inc. ERI Environmental Services, Inc. Environmental Remediation Field Services, Inc., ERI Environmental Services of California, Inc., **Environmental Remediation, Inc.** and **Innovative Ventures Group, Inc.** dated June 5, 1992, assumed all of the liabilities of its sole shareholder/parent corporation **Environmental Remediation, Inc.,** a Deleware corporation.

V.

This prior corporation bearing the name **Environmental Remediation, Inc.** is believed to be the **Environmen-**

tal Remediation, Inc. identified in an act of **TRANSFER OF ASSETS OF MICROBE MASTERS, INC. IN LIQUIDATION** dated January-30, 1991 as the sole shareholder of **Microbe Masters, Inc.** In this act of transfer in liquidation J. Peter Perez, as Liquidator of **Microbe Masters, Inc.**, conveyed all the property of **Microbe Masters, Inc.** to **Environmental Remediation, Inc.**, it sole shareholder and J. Peter Perez, as President of **Environment Remediation, Inc.**, sole shareholder of **Microbe Masters, Inc.**, in the same act of transfer in liquidation accepted the transfer of all the assets of **Microbe Masters, Inc.** and assumed liability for any and all debts or liabilities of **Microbe Masters, Inc.** of whatever description. And, thus, petitioner has reason to believe that defendant **International Biochemicals Group, Inc.** is the legal successor to **Microbe Masters, Inc.** and has assumed the obligation to pay all liabilities of **Microbe Masters, Inc.**, a Louisiana corporation.

VI.

One of those liabilities was that created by a judgment on the 3rd of January, 1986, in the matter entitled "D. H. Faulkenberry, Jr. versus John Elkins, Benefits Systems, Inc., Microbe Masters, Inc.", Civil Action No. 85-146 in the United States District Court, Middle District of Louisiana, rendered in favor of plaintiff C. H. Faulkenberry, Jr. and against defendants John Elkins, Benefits Systems, Inc., and **Microbe Masters, Inc.** in the amount of THIRTY THOUSAND AND NO/100 ($30,000.00) DOLLARS in settlement of his Keogh account with legal interest until paid. This judgment has been recorded in the mortgage records of East Baton Rouge Parish, State of Louisiana on April 30, 1987 at Original 440 Bundle 9918.

VII.

Claude Hiram Faulkenberry, Jr. (plaintiff C. H. Faulkenberry, Jr. in Civil Action No. 85-146) died on July 5, 1992 in Concordia Parish, Louisiana. A **STATUTORY WILL** executed on March 16, 1992 at Vidalia, Louiaiana by Claude Hiram Faulkenberry, Jr. was submitted for probate in "Succession of Claude Hiram Faulkenberry, Jr.", Probate No. 31230A, 7th Judicial District Court of the State of Louisiana, Parish of Concordia. The **STATUTORY WILL** of Claude Hiram Faulkenberry, Jr. named his widow Fern Lea Faulkenberry sole heir. **By. JUDGMENT OF POSSESSION** rendered September 8, 1992 in Probate No. 31230A, Fern Lea Arnold Faulkenberry was recognized and decreed to be the sole Universal Legatee of the entire estate of the decedent Claude Hiram Faulkenberry, Jr., and as such the owner, and she was sent into possession, without benefit of inventory of all the property of the succession of the decedent Claude Hiram Faulkenberry, Jr.

VII.

By act of **ASSIGNMENT OF JUDGMENT** dated October 26, 1993 Fern Faulkenberry assigned all of her interest in the judgment rendered in favor of C. H. Faulkenberry, Jr. in Civil Action 85-146, U.S. District Court, Middle District of Louisiana on January 3, 1986 to petitioner and at all times thereafter petitioner has been the owner of the interest of C. H. Faulkenberry, Jr. in the judgment in favor of C. H. Faulkenberry, Jr. and against John Elkins, Benefit Systems, Inc., and **Mircobe Masters, Inc.** in Civil Action 85-146. This act of **ASSIGNMANT OF JUDGMENT** has been recorded in the mortgage records of East Baton Rouge Parish, State of Louisiana on October 27, 1993 at Original 561 Bundle 10450.

IX.

Petitioner has reason to believe that defendant **International Biochemicals Group, Inc.** is an obligor of the judgment rendered in favor of C. H. Faulkenberry, Jr. in Civil Action 85-146. Petitioner is the current owner of, and successor to, the interest of C. H. Faulkenberry, Jr. in the judgment rendered in Civil Action 85-146. Nothing has been paid on this judgment, the full amount of it is still due and the statute of limitations is about to run on the enforcement of the judgment and petitioner seeks to revive it for the maximum extended period permitted by law against **International Biochemicals Group, Inc.**, as successor to original judgment against the original judgment debtors John Elkins, Benefit Systems, Inc., and **Microbe Masters, Inc.** in the original action.

X.

Petitioner, as successor of the interest of C.H. Faulkenberry, Jr., is entitled to have this judgment revived before it prescribes.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

DAVID L. SMITH	CIVIL ACTION
VERSUS	NO. 95-2041
INTERNATIONAL BIOCHEMICALS GROUP, INC.	SECTION A-1

VERIFICATION

Personally come and appeared before me, the undersigned Notary Public, David L. Smith, Who being duly sworn, deposed and said that he is the petitioner in the foregoing petition and that all of the allegations of fact therein contained are true and correct except where made on information and belief which he believes to be true and correct to the best of his knowledge, information and belief.

s/David L. Smith
DAVID L. SMITH
2834 S. Sherwood Forest,
Suite D8
Baton Rouge, Louisiana 70816
504/291-8003

SWORN TO AND SUBSCRIBED BEFORE ME, Notary Public, this 28th day of December, 1995 in Baton Rouge, Louisiana.

s/Judy Stewart Patterson
NOTARY PUBLIC

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

DAVID L. SMITH	CIVIL ACTION
VERSUS	NO. 95-2041
INTERNATIONAL BIOCHEMICALS GROUP, INC.	SECTION A-1

ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFF'S PETITION TO REVIVE JUDGMENT

International Biochemicals Group, Inc. ("International Biochemicals") responds to the Petition to Revive Judgment ("petition") filed on December 28, 1995, by David L. Smith ("Smith") as follows.

First Defense

Smith fails to state a claim upon which relief can be granted.

Second Defense

Through Microbe Masters, Inc., was identified in the action, International Biochemicals avers that Microbe Masters, Inc. was not a party to Civil Action No. 85-146 "*C. H. Faulkenberry, Jr. v. John Elkins, Benefits System, Inc., Microbe Masters, Inc.,*" was not served in the suit, and was a stranger to the proceeding. International Biochemicals further avers that the court record containing pleadings from 1985 and 1986 was unavailable for review.

Third Defense

The judgment rendered in Civil Action No. 85-146 "*C.H. Faulkenberry, Jr. v. John Elkins, Benefits Systems, Inc., Microbe Masters, Inc.,*" is a nullity as to Microbe Masters, Inc.

Fourth Defense

Alternatively, to the extent that the judgment is not a nullity, the judgment was satisfied as to Microbe Masters, Inc. by the partial cancellation of judgment and judicial mortgage filed and recorded in East Baton Rouge Parish as original 603, bundle 10012.

AND NOW, International Biochemicals responds to the individual paragraphs of the petition, as follows:

5.

International Biochemicals admits that it is the successor corporation to Microbe Masters, Inc., specifically denies that Microbe Masters, Inc. was an original judgment debtor of a judgment granted by the United States District Court, Middle District of Louisiana, on January 3, 1986, in Civil Action No. 85-146 "*C.H. Faulkenberry, Jr. v. John Elkins, Benefits Systems, Inc., Microbe Masters, Inc.*" and denies all other allegations in paragraph one of the petition.

6.

International Biochemicals admits it is a foreign corporation organized under laws of Deleware and authorized to do and doing business in the State of Louisiana, it main-

tains corporate offices at 10201 Mayfair Drive, Baton Rouge, Louisiana 70809 and has appointed Gary Legendre at 10201 Mayfair Drive, Baton Rouge, Louisiana 70809 as its registered agent for service of process.

7.

International Biochemicals admits the allegations in paragraph three of the petition.

8.

International Biochemicals admits the allegations in paragraph four of the petition.

9.

International Biochemicals admits the allegations in paragraph five of the petition except it denied Smith's belief.

10.

International Biochemicals admits that a judgment was rendered in "*C.H. Faulkenberry, Jr. v. John Elkins, Benefits Systems, Inc., Microbe Masters, Inc.,*" Civil Action No. 85-146, in the United States District Court for the Middle District of Louisiana in favor of plaintiff, C.H. Faulkenberry, Jr. in the amount of $30,000 with legal interest until paid; that the judgment was recorded in the mortgage records of the East Baton Rouge Parish, State of Louisiana, on April 30, 1987, an original 440 bundle 9918; denies that it assumed any obligation created by that judgment and denies the remaining allegations contained in paragraph six of the petition.

International Biochemicals denies the allegations in paragraph seven for lack of sufficient information to justify a belief.

12.

International Biochemicals denies the allegations in paragraph eight for lack of sufficient information to justify a belief.

13.

International Biochemicals denies that it is an obligor of the judgment rendered in favor of C.H. Faulkenberry, Jr. in Civil Action No. 85-146: admits that petitioner filed a motion for revival of the judgment in Civil Action No. 85-146; and denies the remaining allegations in paragraph nine.

14.

International Biochemicals denies the allegations in paragraph ten.

WHEREFORE, defendant, International Biochemicals Group, Inc., prays that this answer be deemed good and sufficient and that after proceedings are had, the Court render judgment in favor of International Biochemicals and against David L. Smith dismissing this action with prejudice, and awarding it all costs expenses to which may be entitled, and awarding it all legal, equitable, general, and other relief to which it may be entitled.

Respectfully submitted,

s/Alton E. Bayard, III

Alton E. Bayard, III (Bar No. 2868)
Michele Whitesell Crosby
(Bar No. 20152)
Jones, Walker, Waechter, Poitevent, Carrére & Denégre, L.L.P.
One American Place, Suite 1700
Baton Rouge, Louisiana 70825
Telephone: (504) 377-8900

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been served upon all known counsel of record by placing a copy of same in the U.S. Mail, postage prepaid, and properly addressed this 22nd day of March, 1996.

s/ Alton E. Bayard, III

Alton E. Bayard, III